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In the Supreme Court of the United States

OCTOBER TERM, 1976

KENT CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND
JOHN S. IRVING, GENERAL COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-25a) is reported at 530 F. 2d 612. The order of the district court (Pet. App. 32a-34a) is not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on April 21, 1976. On July 16, 1976, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including July 29, 1976 (Pet. App. 2a). The petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a report written by a National Labor Relations Board Regional Office employee following his investigation of unfair labor practice charges, which is used as a basis for discussion at a meeting of the Regional Director and other staff members, is an "intra-agency memorandum" protected against disclosure by Exemption 5 of the Freedom of Information Act (5 U.S.C. 552(b)(5)) even though copies of the report bear marginal notations made by individuals at the meeting.

STATEMENT

A. The Documents at Issue

In the spring and summer of 1973, various unfair labor practice charges were filed with the National Labor Relations Board's Tenth Regional Office in Atlanta against Kent Corporation ("Kent") (Pet. App. 7a; A. 50).[1] Charges in three of these cases were assigned for investigation to Donald E. Howard, the resident officer of a Region Ten sub-level office, and charges in a fourth case, filed later, were referred for investigation to a Regional Office attorney, Donald W. Davis (Pet. App. 72; A. 50, 58). Following their investigations of the charges, in which they had interviewed witnesses and assembled and reviewed documentary evidence, each of these Board employees wrote an investigation report, summarizing the relevant evidence and making recommendations regarding disposition of the charges (Pet. App. 7a; A. 50-51, 54, 58).

Howard's report was discussed at a meeting on May 30, 1973, attended by Walter C. Phillips (the Regional Director), Howard, and two Regional Office attorneys.

[1]"A." refers to the joint appendix in the court of appeals.

During the discussion, Phillips indicated orally which charges he believed had merit (and hence should be included in a complaint if no settlement were reached) and which charges he believed should be dropped, either by a withdrawal solicited from the charging party or by dismissal.[2] Davis, who had not attended the meeting, then drew up a complaint encompassing some of the charges discussed there,[3] together with a subsequently filed charge that was described in another report.[4] Before drafting the complaint, Davis talked with Howard and consulted notes Howard had made, some of them at the meeting, in the margins of his copy of the investigation report. (Pet. App. 7a; A. 52-53, 57, 63-70).

Davis's own report, prepared after the issuance of the complaint on the charges investigated by Howard, was discussed at an August meeting attended by Regional Director Phillips, Davis, and other attorneys. Davis and Phillips both made notes on their copies of the report indicating which charges Phillips decided the Regional Office should go forward on, absent settlement, and which ones should be dropped (Pet. App. 8a; A. 49, 58). Davis subsequently drafted a second complaint, to be

[2]As noted in *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 139, Regional Directors have been delegated authority to determine whether or not to issue a complaint, subject to a right of appeal to the General Counsel.

[3]Others were withdrawn by the charging party at Howard's suggestion (Pet. App. 7a, n. 7; A. 52, 57).

[4]This report is not at issue; Kent conceded in its brief to the court below (p. 2) that this Court's decision in *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, foreclosed it from seeking documents pertaining to decisions to issue complaints. Thus, Kent now seeks only those portions of the Davis and Howard reports which pertain to charges that were ultimately dismissed.

consolidated with the earlier one (A. 71-78). In addition, he drafted a "partial dismissal letter" sent to both Kent and the charging party. This letter, signed by the Acting Regional Director, set forth the reasons for dismissing the various charges (A. 79-81).[5] In drafting the complaint and the letter, Davis referred to his marked copy of the investigation report (Pet. App. 8a; A. 58-59).

B. The District Court Proceeding

On November 16, 1973, Kent filed suit in the district court, pursuant to the Freedom of Information Act, 5 U.S.C. 552 (FOIA), alleging that certain documents it had requested from the Board's General Counsel had been improperly withheld (A. 4-8). It sought seven different categories of documents (A. 7-8, 10), including the following:

> 5. The final opinion or order of the Regional Director, or his authorized deputy or assistant, in Case Nos. 10-CA-10077, recommending to the charging party that it withdraw the charge in that case, and making the determination to dismiss the charge if not withdrawn; namely, the document referred to in Section 101.5 of the Board's Statement of Procedure with respect to that case.
>
> 6. Any documents incorporated by reference in any of the above documents.

After the district court granted Kent's motion for a preliminary injunction requiring the disclosure of the documents (Pet. App. 26a-32a),[6] the Board filed a motion

[5] 29 C.F.R. 102.19 provides that, whenever a Regional Director declines to issue a complaint on unfair labor practice charges, he "shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action."

[6] Due to a misunderstanding, the Board was not represented at the hearing on the motion.

to vacate the injunction and submitted for *in camera* inspection all documents arguably coming within the terms of Kent's requests which had been withheld (Pet. App. 32a). The district court thereafter issued its final order (Pet. App. 32a-34a) directing the Board to produce "those parts of the investigation reports and the marginal notes which constitute the final decisions to prosecute or not to prosecute."

C. The Opinion of the Court of Appeals

The court of appeals reversed the district court, holding that the marked up investigation reports were predecisional documents rather than "final opinions" and that, as reports prepared in anticipation of possible litigation, they were attorney work product privileged from disclosure under Exemption 5 of the FOIA (Pet. App. 12a-25a).

ARGUMENT

The decision of the court of appeals is a correct application of the principles enunciated in *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, and *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168,[7] and it does not conflict with decisions of any other court of appeals. No issue warranting review is presented.

1. In *Grumman, supra,* 421 U.S. at 189-192, this Court held that certain "Regional Board Reports" and "Division Reports," prepared by Regional Boards or by a subpanel of the Renegotiation Board and used by the Board as a basis for consideration of the excess profits issues presented, were not "final opinions" within the meaning of subsection (a)(2) of the FOIA, 5 U.S.C.

[7] The district court's decision herein was rendered prior to these decisions.

552(a)(2), even when the Board ultimately reached the same conclusions as those recommended in the reports. Rather, this Court held (*id.* at 186, 192), the reports were "precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5 which must remain uninhibited and thus undisclosed"; their disclosure, the Court stated, would give an inaccurate impression of the Board's actual reasoning and "impinge on the Board's predecisional processes." The court of appeals (Pet. App. 14a-19a) properly applied this rationale to the reports prepared by the Board agents in the present case, for they served simply as a basis for the staff discussion during which the Regional Director decided on the disposition of the various unfair labor practice charges.[8]

Nor is a contrary conclusion required because of the notations made in the margins of these reports. The court of appeals found, after an *in camera* inspection, that the notations by themselves "are gibberish," and that, even when read in context with the reports, they are "ambiguous scribbles [which] do not clearly show the basis of the decisions in question" (Pet. App. 15a). The court added (Pet. App. 15a-16a):

> But even if these markings were both coherent and lucid, the case could come out no differently. There would be no assurance that they represented the institutional view of the Regional Office. Even

[8]Kent's contention (Pet. 12, n. 4) that the court of appeals' reliance on *Grumman* was misplaced because the Regional Director, unlike a division of the Renegotiation Board, has decision-making authority misses the point that the proper analogy is between the division of the Renegotiation Board and Regional Office employees Howard and Davis in the present case, who wrote the investigation reports and who could only make recommendations regarding the disposition of charges.

> Phillips' own copies of the reports might, for all we could tell, be inscribed with only some of the reasons behind his choice. And some of the points to be found in the margins might be tentative conclusions, put on paper only while he was on the way to making up his mind.

In short, the reports and marginal notes could not accurately be characterized as "agenda minutes [providing] the *only* written reasons for the Director's adjudication" (Pet. 10), even if the Regional Office had not issued a letter explaining the basis for dismissing the charges.[9] To require their production would only have served to permit Kent to probe the "mental processes" of the decision-maker which, as the court of appeals correctly noted (Pet. App. 17a), is contrary to the rationale of the *Morgan* cases,[10] a rationale that is reflected in the policies underlying Exemption 5 of the FOIA.[11]

[9]By "agenda minute," Kent apparently means an internal document, prepared after a decision has been made, to record the basis for the decision (Pet. 4, 10; but see *National Labor Relations Board* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 140). There is no evidence that such documents were "usually," or indeed ever, prepared in the Board's Atlanta Regional Office, and the record shows that no such document exists in the instant case (A. 48-59).

[10]*United States* v. *Morgan*, 313 U.S. 409, 422; *Morgan* v. *United States*, 304 U.S. 1, 18.

[11]Contrary to Kent's contention (Pet. 12-13), the decision of the court of appeals did not impose an unwarranted burden of proof on Kent respecting the question whether the reports had been "adopted" by the Regional Director when he made his decisions. In the first place, the observation of this Court in *Grumman* (421 U.S. at 186; emphasis added) that, "*absent indication that its reasoning has been adopted*, there is little public interest in disclosure of a [Regional Board] report," suggests that, once a document is shown to consist of "predecisional deliberative advice and recommendations," it is up to the party seeking its disclosure

2. Following this Court's holding in *National Labor Relations Board* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 154, that Exemption 5 of the FOIA incorporates the attorney work product privilege, the court of appeals properly concluded that the reports came within the privilege and hence were protected from disclosure by Exemption 5. Contrary to Kent's contention (Pet. 14), this holding is entirely consistent with this Court's conclusion in *Sears* that Advice and Appeals Memoranda directing the dismissal of unfair labor practice charges (as distinguished from those directing the issuance of a complaint) are outside the work product privilege. That conclusion was reached because such memoranda are final opinions, prepared *after* the decision to dismiss the charges has been made, and not because the cases to which they pertained are ultimately "closed." In the present case, as the court of appeals noted (Pet. App. 23a), the reports were written *before* a decision to dismiss the charges had been made and were "necessarily * * * founded on the assumption that any given charge *might* become enmeshed in litigation."[12]

Finally, the court of appeals' conclusion (Pet. App. 21a-24a) that the reports contained no "reasonably

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to show that it was in fact adopted by the decision-makers. (See also 421 U.S. at 190.) In any event, the courts below had before them (1) affidavits by the Regional Director and the authors of the reports describing the circumstances under which the reports were written and what use was made of them (A. 48-59), (2) the reports themselves with the marginal notations in question, and (3) the "partial dismissal letter" (A. 79-81) in which the Regional Office's reasons for dismissing the charges were set forth. The Board itself thus came forward with ample evidence from which a court could determine whether the reasoning of the reports was actually adopted by the Regional Director.

[12]As noted (n. 4, *supra*), Kent now seeks only reports pertaining to charges which were ultimately dismissed.

segregable" nonexempt factual portions is fully consistent with *Hickman* v. *Taylor,* 329 U.S. 495, the leading case on the attorney work product privilege. There this Court held that witness statements taken by an attorney came within the privilege, even though such statements necessarily contain factual material. Moreover, there was no remand for segregation of the factual portions of the memoranda directing issuance of complaints in *Sears,* despite the fact that such memoranda summarized relevant evidence.[13]

3. Kent's assertion (Pet. 13) that the decision of the court of appeals conflicts with the decision of the District of Columbia Circuit in *Ash Grove Cement Co.* v. *Federal Trade Commission,* 511 F. 2d 815, is insubstantial. In *Ash Grove,* the court of appeals remanded the case to the district court with directions that the court require the agency to prepare an itemized description of a large volume of documents known as "chronological minutes" and that it examine *in camera* a representative portion of those documents in order to determine whether they were "policy determinations" which operated as "binding agency opinions and interpretations." *Id.* at 818. If the district court determined that they were such final opinions, then the "minutes" would not be within Exemption 5. *Ibid.*[14] In contrast, in the instant

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[13]Kent's discussion (Pet. 14, n. 6) of alleged "inconsistencies" between the court of appeals' holding that the reports were exempt in their entirety and its dictum (Pet. App. 24a-25a) that reports consisting of "primary information" might not be thus exempt, misses the distinction between undigested factual material from external sources and information "sifted" by an attorney. See *Hickman* v. *Taylor, supra,* 329 U.S. at 511.

[14]In denying the government's petition for rehearing, the court emphasized (519 F. 2d 934, 935) that: "Nothing in our opinion requires that the policy discussions or recommendations of FTC Commissioners be revealed to the public * * * [since] memoranda (and records of oral discussions) leading up to a final opinion or binding decision are protected from disclosure by Exemption 5."

case the documents in question were examined by the court of appeals and found to be predecisional advisory documents with fragmentary marginal notes of oral discussions (Pet. App. 16a).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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